Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1997

THOMAS POLLAK, Individually, etc. and PATRICIA POLLAK WEISS, Individually, as a Co-Conspirator, and as the Purported Successor Trustee and Beneficiary of the Albert Pollak Trusts,

Petitioners,

vs.

ARTHUR H. COURSHON and JACK R. COURSHON, each Individually, as Trustees of the Aaron Courshon and Paul Pollak Trusts, as Former Managing Partners of the Thunderbird Partnership, and as Beneficiaries of the Aaron Courshon Trust, PHYLLIS POLLAK BERKETT, JAMES POLLAK, and GAIL POLLAK BARIL, each Individually, as Co-Conspirators, and as Beneficiaries of the Albert Pollak Trusts.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In 1984 a Florida judge appointed Weiss successor trustee of her father's testamentary trust, which benefitted Weiss, her siblings and her mother. In 1985 Weiss retained counsel and initiated Florida proceedings to challenge the trust's administration by former Trustees, the Courshons. In 1986 the Courshons initiated this diversity case. Florida courts found that the Courshons had no claim against Weiss for tortious interference when a promissory note came due and that Petitioners were entitled to maintain their legal action against the Courshons for an accounting and other claims. Weiss's mother succeeded Weiss as trustee and settled a decade of litigation by paying the Courshons over $600,000 in full mitigation of alleged breach of contract and other claims, securing a court ordered agreement directing the Courshons to pay all of their own attorneys fees. Despite numerous Florida decisions and well-established Florida statutory and judicial law exculpating Petitioners from all civil liability in this diversity case, the district court dismissed Petitioners' counterclaims and cross-claims and the case was tried. The jury returned adverse verdicts. The federal judiciary ignored all matters of Florida law which had pre-determined every legal issue and material fact.

The questions for review are:

1. Did the 11th Circuit correctly follow Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 135 L.Ed.2d 659 (1996) in its appellate review of the district court's Order Disposing of Post-Trial Motions to ensure compliance with the "twin aims" of the Erie doctrine notwithstanding the Seventh Amendment?

2. Did the federal courts correctly and timely give Full Faith and Credit to existing Florida case law between the parties and enforce prior contract damage mitigation by a fiduciary's financial settlement, where the Settlement Agreement was part of the court's records of which the courts were compelled to take judicial notice notwithstanding the jury's role?

3. Does the 11th Circuit merits panel's unpublished opinion correctly follow the United States Supreme Court's recent opinion in Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996) which reviewed the Second Circuit analysis of New York's statutory remittitur law and expressly held that the Seventh Amendment allows appellate review of a district court's motion to set aside any award as excessive where it flows from a diversity case, and that furthermore such a review of all damage awards is compelled by the State's legislative and judicial objectives insofar as the Erie doctrine precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court for any reason including sufficiency or quality of evidence ?

4. Was Florida's Economic Loss Rule timely and properly applied so as to provide for complete "tort damage immunity" on all tort claims for defamation, tortious interference with contract, conversion, intentional infliction of emotional distress, and conspiracy, where the parties' relationship as (former) trustee-trust beneficiary was already established by 2 contracts and there was no legally sufficient personal injury or property damage ?

5. Was the 11th Circuit's denial of WEISS' motion for certification to the Supreme Court of Florida consistent with the 11th Circuit's past history of certification of state law questions concerning the application of Fla. Stat. §768.73 pertaining to post-verdict judicial review of excessive punitive damage awards, or did the panel transgress the Due Process Clause by deviating from the traditional "should-certify-if-there-is-any doubt" rule in light of BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1996 U.S. LEXIS 3390 (1996)?

6. Did the merits panel err in denying WEISS' motion for Article V, Section 3(b)(6) certification of all issues related to the application of Fla. Stat. §768.73's presumptive

3-to-1 cap on punitive damages when there were 3 punitive damage award judgments exceeding the 3 to 1 cap and the panel only vacated "the $515,000 punitive damages judgment" and remanded for "further findings of fact" prior to allowing the Supreme Court of Florida an opportunity to interpret or change existing law pertinent to its application in light of the intervening opinion in BMW of North America, Inc. v. Gore to ensure that if any such "further findings" are needed, they would be guided by an informed opinion as to the application of State substantive law pertinent to an excessive $550,000 punitive damage award and 2 other joint and several **punitive damage awards of $515,000 based upon 2 $1 compensatory awards** ?

7. Did the 11th Circuit merits panel deviate from other merits panels by its blanket affirmance of all but 1 issue in this diversity case and therefore err in failing to find "any doubt as to the [district court's] application of state law" insofar as Florida's Economic Loss Rule; Florida's choice of law provisions for contracts and torts; Florida's application of the doctrines of res judicata, collateral estoppel, waiver and prohibition against "splitting of causes of action"; and Florida's statutory presumptive cap on 3-to-1 punitive damage awards (Fla. Stat. §768.73) as a predicate to denying WEISS' motion for certification of many questions to the Supreme Court of Florida pursuant to Article V, Section 3(b)(6) of the Florida Constitution ?

8. Where Florida law requires that tortious civil conspiracy be predicated solely upon another Florida tort, did a federal diversity court misguide the jury when finding "the conspiracy was necessarily an amalgamation of other counts in the complaint" such a breach of contract, and mistakenly equate Florida civil conspiracy with federal criminal conspiracy (where criminality exists based upon overall "objectives" and "goals" notwithstanding that different parties may join and leave at different times)?

9. Was the First Amendment transgressed by no judicial recognition of the presumptive privileges for (a) a court-appointed trustee's petitioning a governmental regulatory body about a private family trust matter where the "public concern" requirement is met by the functions of that office, (b) *pro se* litigants' petitioning a state court to redress grievances concerning perceived improprieties of a court-appointed "commissioner" (special master) without incurring "sanctions" therefor of the type permitted against state-licensed lawyers, and (c) protection of correspondence between attorneys representing opposing parties or themselves so long as the topic pertains to a judiciary proceeding?

10. Does Florida's choice of law doctrine require proper jury instructions about the fiduciary duties of Florida attorneys serving as trustees to out-of-state beneficiaries and particularly California Civil Code §1542 pertaining to Petitioners' avoidance of a "general release" to former trustees based upon undisclosed facts including the existence of a lawsuit concealed from Petitioners?

11. Did the Court's (a) improvident appointment of a special master in lieu of any federal magistrate; (b) dismissal of all counterclaims and cross-claims; (c) refusal to consider the Settlement Agreement in its own court files for mitigation purposes related to contract breaches and set-offs/off-sets for torts generally; (d) evidentiary rulings regarding Rules 401, 402, 403, 404, 405, 411, and 1006; and (e) a Special Verdict sheet riddled with errors, so taint the proceedings as to require a new trial after full reconsideration of the prior Florida decisional law relative to these parties?

LIST OF PARTIES

The parties to the proceedings are:

Petitioners:

THOMAS POLLAK
PATRICIA POLLAK WEISS

Respondents:

ARTHUR H. COURSHON
JACK R. COURSHON
PHYLLIS POLLAK BERKETT

There are no parent companies or nonwholly owned subsidiaries.

James Pollak is deceased and Gail Pollak Baril is not a party.

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OPINIONS BELOW

The decision entitled "Order Disposing of Post-Trial Motions" and final judgment of the United States District Court for the Southern District of Florida are unreported (App. B, D). The opinion and judgment of the Eleventh Circuit Court of Appeals which are sought to be reviewed are unpublished (App. A, E). The order denying rehearing/rehearing en banc is unreported (App. C).

STATEMENT OF JURISDICTION

Jurisdiction to review a judgment of the Court of Appeals for the Eleventh Circuit, affirming the district court's Order Disposing of Post Trial Motions except for vacating and remanding "the $515,000 punitive damages judgment in Count 13", is invoked pursuant to 28 U.S.C. §1254(1).

Respondents brought this case in the United States District Court for the Southern District of Florida on February 24, 1986 pursuant to 28 U.S.C. §1332. A final judgment in Respondents' favor was entered on March 16, 1995. The Order Disposing of Post-Trial Motions was entered October 6, 1995. Petitioners filed separate timely notices of appeal to the Eleventh Circuit on October 25, 1995 and November 3, 1995. Title 28 U.S.C. §1291 provided federal appellate jurisdiction over the final judgment of the District Court, as amended by the Order Disposing of Post-Trial Motions.

On July 1, 1997, the 11th Circuit affirmed the District Court's Order and Judgment in part and vacated and remanded in part, denying all pending motions. The mandate issued on September 30, 1997. Petitioners sought rehearing and rehearing en banc which was denied on September 15, 1997. This Petition For A Writ of Certiorari is timely filed within 90 days of September 15th, by December 14, 1997.

STATUTES INVOLVED

United States Constitution, Amend. I provides in pertinent part: "Congress shall make no law...abridging the freedom of speech...."

28 U.S.C. §1738 provides in pertinent part: "Such [State] Acts, records and judicial proceedings or copies thereof...shall have the same full faith and credit in every count within the United States...as they have by law or usage in the courts of such State..."

California Civil Code §1542 provides in pertinent part:

> "General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

Fla. Stat. §768.73 provides in pertinent part: "In any civil action based on misconduct in commercial transaction...the judgment for the total amount of punitive damages awarded a claimant may not exceed three times the amount of compensatory damages awarded except...if any award exceeded the limitation...and the defendant is entitled to remittitur of the amount in excess, [unless] the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which was presented to the trier of fact."

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This diversity action was commenced by the COURSHONS in February 1986 after WEISS (as appointed trustee) had commenced two Florida state court actions against the COURSHONS in 1985 related to common law claims and breaches of their statutory duties as trustees. By then, ARTHUR COURSHON, as Trustee, had also asserted cross-claims against WEISS in a third Florida state court interpleader action regarding the balloon payment of the Thunderbird Motel's purchase money mortgage.

This 13 count diversity action was founded solely upon common law contract and tort claims, purportedly cognizable under Florida law in 1986. All claims arose out of a variety of transactions based upon the unwinding of the former trustee-beneficiary relationship, created under the testamentary trust established under the will of Petitioners' father Albert Pollak who died in 1962.

In June 1986, WEISS also brought a legal malpractice action against the COURSHONS and their law firm in a Florida state court. It related to the work that their law firm

performed in connection with the sale of the Thunderbird Motel in 1980 and the subsequent claims of a real broker for fraud and conspiracy. That broker's lawsuit was not revealed to WEISS and POLLAK in 1983 when they executed their General Releases in California in favor of the COURSHONS when they stepped down as Trustees.

Over the decade of pre-trial proceedings, the Court denied WEISS' and POLLAK's Counterclaims and Cross-Claims, even though they argued that torts and punitive damages were excessively plead. It also dismissed Petitioners' co-beneficiaries BARIL, JAMES POLLAK and BERKETT, as each settled separately.

In the meantime, there were numerous judicial decisions in the 4 Florida state court actions, which were reviewed by Florida's Third District Court of Appeals. Three cases reached conclusion; one is still pending in the probate court. Importantly, in Weiss v. Courshon, 618 So.2d 257 (Fla. 3 DCA 1993) the Florida courts had reversed an earlier trial court decision and noted that:

> "The order dismissing the general jurisdiction action explicitly preserved the rights of the beneficiaries to assert claims against the current or former trustees. The prior order also noted that WEISS and POLLAK were not parties to the general jurisdiction action. Clearly the order in the general jurisdiction case was not intended to have preclusive effect with respect to the beneficiaries' individual claims. See Restatement (Second) of Judgment, §26(1)(b) (1981)."[R23-161]

The trial began without Petitioners' counterclaims (which claims had been preserved by the Florida courts) because the district court relied on the decision that was already reversed. The COURSHONS withdrew their claims for fraud, breach of agreement to transfer trusteeships, and slander of title, leaving 10 claims for trial.

After jury selection, the COURSHONS presented their case over 9 days during February and March 1995. Over Petitioners' objections, plaintiffs proceeded to demonstrate that Petitioners had engaged in a "pattern of malice" for a

decade, and (over vehement objections) they introduced a damages summary chart of legal fees in support of their theory that Petitioners caused them to spend a great deal of money in legal fees, to wit:

"Composite Exhibit 187 and 188 Damage Schedule"

1. Interpleader Action Trial and Appeal $138,851.38
2. Malpractice Claim $ 46,836.83
3. Accounting Action $260,217.07
4. Appeals of 2 and 3 $ 35,846.53
5. Federal Case $359,000.00
   ($60,000 for Counterclaims)
6. Farkus Litigation additional expenses$ 20,000.00"

The chart was inconsistent with Rule 1006 criteria.

Thereafter, Petitioners moved for directed verdict in reliance upon issues of law and state court adjudicated facts because of (i) Florida state court decisions pertaining to these parties in particular, (ii) Florida judicial law such as Florida's Economic Loss Rule and First Amendment law pertaining to speech, and (iii) the complete mitigation of damages by Plaintiffs' Settlement Agreement with Petitioners' trustee acting on their behalf which was already "of record" for "Judge Hoeveler" to enforce, and had fully disposed of every single contract and tort count the COURSHONS were asserting in the federal action.

Importantly, in the COURSHONS' settlement of 2 of the state court cases with Petitioners' interim trustee BERKETT in 1991, the state judge specifically ordered that **"The cases are dismissed with prejudice. The parties are to bear their own costs and attorneys fees."** The COURSHONS read it aloud at trial. A later ruling in Weiss v. Courshon, 618 So. 2d 255, 258 (Fla. 3d DCA 1993) reh. den., specifically referenced the prior settlement agreement in the state court litigation in which interim trustee BERKETT had globally settled litigation with the COURSHONS for a large payment as a predicate to a court approved stipulation of settlement of the Trusts' claims against the COURSHONS and the COURSHONS' surrender of claims. (Under Florida law pertaining to "splitting of causes of action" and Fla. R. Civ. P. 1.170(a) re "compulsory counterclaims", this settlement forever precluded the COURSHONS

from forum-shopping in federal court to raise any claims they could have raised in state court.) Since the Settlement Agreement and the Third DCA opinion were already "of record" in this case, the judge initially agreed during trial to "take judicial notice" of them. [R20-47] However, it became apparent that the judge did not fulfill the requirements of judicial notice in a timely manner, if at all.

The Court granted some, but not all of the directed verdict requests, dismissing 6 counts against POLLAK and just 1 against WEISS after the close of Plaintiffs' case. Although Florida case law, the mitigation doctrine, Florida's Economic Loss Rule, a variety of judicial decisions and successor trustee BERKETT's Settlement Agreement with the COURSHONS were brought to the Court's attention repeatedly, it either delayed or refused to take judicial notice of its own records and Florida law. Petitioners argued that based upon the extensive history of Florida case law between these identical parties, the COURSHONS could not continue to assert claims that either were -- or could have been -- resolved in the concluded state court cases.

The judge disagreed, gave jury instructions contrary to the Florida case law, and essentially told the jury that they were the fact finders who were charged with following the jury instructions and completing the Special Verdict form. The judge refused many significant jury instructions requested by Petitioners, including case law from Florida's Third District Court of Appeal that held that WEISS had every right to sue the COURSHONS for an accounting and related charges. (see Weiss v. Courshon, 618 So. 2d at 258); an instruction concerning the COURSHONS' duty to mitigate their damages as they did when they had entered into the Settlement Agreement and been fully paid for all claims for contract breaches and torts, etc.; and an instruction that would require that the jury apply Calif. Civ. Code §1542, pertaining to the lack of efficacy of all "general releases" executed in California where material information is not revealed to the purported releasor either by mistake, concealment or otherwise.

Despite Florida's choice of law provisions requiring the California law be explained, the judge prejudicially

declined to tell the jury about the law Petitioners relied upon when they were Californians a decade ago. The judge also declined to treat Petitioners' affirmative defense of fraud (in the inducement) as a "misdesignated" counter-claim under Fed. R. Civ. P. 8(c) although justice requires a balanced trial and Petitioners still had these types of claims pending in state court against the COURSHONS.

The judge also declined to accept Petitioners' arguments that the First Amendment compelled a legal analysis and judicial procedure "as a matter of law" that differed from the Florida pattern jury instructions for "defamation". Although Petitioners cited the District Court to the lead article in the June 1991 edition of The Florida Bar Journal's "The First Amendment Chronicle" entitled "Florida's Not So Standard Defamation Jury Instructions", the District Judge did not credit Justice [now 11th Circuit Judge] Rosemary Barkett's published dissent which explicitly stated that she does "not believe these standard jury instructions adequately and correctly reflect the state defamation law." In re Standard Jury Instructions (CivilCase 89-1) 575 So.2d 194 (Fla. 1991) Petitioners also brought to the District Court's attention that Justice Barkett had cautioned that "these instructions do not have the effect of the law, and litigants should not rely on them as the correct constitutional or common-law standards." Id.

The District Court, however, was unpersuaded by Petitioners' advocacy that both Florida law and the First Amendment precluded civil liability against WEISS for her letter writing "speech" to another attorney about problems relating to coaxing JAMES POLLAK'switness testimony and coerced cooperation in pending litigation.

The jury returned these verdicts against WEISS:

Count 3- Tortious Interference: $138,000 + $550,000 punitive

Count 4 - Conversion: $1 + $1 punitive

Count 7 - Breach of Agree. to Continue Partnership - $10,000

Count 8 - Breach of General Releases - $100,000 to JACK COURSHON & $100,000 to ARTHUR

Count 9 - Defamation - $125,000 + $1 punitive to JACK

and $125,000 + $1 punitive to ARTHUR

Count 10 - Defamation - $1 + $1 punitive (each) JACK & ARTHUR

Count 12 - Intentional Infliction of Emotional Distress: $1 + $1 punitive (each) JACK & ARTHUR

Count 13 - Conspiracy - $1 + $1,015,000 punitive to JACK; $1 + $1,015,000 punitive to ARTHUR

Identical verdicts were returned against POLLAKon Counts 7, 8, 12 & 13.

The punitive damages to compensatory damages ratio on Count 13 was 1,015,000:1.

Petitioners filed numerous post-trial motions: 1) Motion for a Judgment as a Matter of Law and Renewed Motion for a Directed Verdict, 2) Motion for a Mistrial and New Trial, 3) Motion for an Order of Findings of Fact and Conclusions of Law for Remittitur, Set-Offs, Offsets and Mitigation of Damages, 4) Motion for Rule 11 Sanctions Against All Plaintiffs and Steel, Hector & Davis, 5) Motion for an Order Staying Execution of Proceedings to Enforce the Judgment and 6) Emergency Motions for Immediate Mediation. These motions argued that the Court had not followed either federal law and/or Florida substantive law and had ignored the Florida case law precedent that established Florida law as between these parties.

The COURSHONS' answer brief made a single point, urging that "Only extraordinary circumstances permit this Court to intercede at this point."

On October 6, 1995, the Court issued an Order Disposing of Post-Trial Motions. It seemingly found that the Seventh Amendment's Re-Examination Clause precluded it from changing the jury's own fact finding, notwithstanding Petitioners' arguments that State substantive law flatly precluded both the jury instructions and the verdict. It refused to disturb any of the jury's findings of fact, except for making a change to one part of Count 13. Count 13 awarded punitive damages of $1,015,000 against WEISS and POLLAK to ARTHUR and punitives of $1,015,000 against both again to JACK based upon a companion $1 joint and several compensatory damage award. The Court found no duplication of earlier jury awards, although the

only joint tort had been the $1 intentional infliction of emotional distress claim that was accompanied by its own $1 punitive damage award. The judge would not apply the Settlement Agreement to mitigate any damages as a matter of law, as he had earlier indicated it would.

Despite the magnitude of the verdict and the comprehensive arguments on Florida law raised in post-trial motions, the Court did not even consider all of them and felt overburdened, writing: "Defendants raised a multitude of grounds for relief...Given the breadth of the pleadings the Court will not undertake to address every issue".

Although Fla. Stat. §768.73 states that punitive damage awards above 3 times the compensatories are presumed excessive, the District Court remitted only $500,000 off the joint and several award of $1,015,000 to JACK and the same amount off regarding ARTHUR. Although the only tort which both WEISS and POLLAK had both committed was the tort of "intentional infliction of emotional distress", the jury instruction gave the federal jury free reign to consider all of the conduct which WEISS and POLLAK had done together, including the alleged breach of the partnership continuation agreement and the General Releases executed in their home state of California. In its post-trial order, the District Court found that "**the conspiracy was necessarily an amalgamation of other counts in the complaint**", which would mean that given the overbroad instruction on the conspiracy count, the jury would have incorrectly deduced, just as the judge did, that tortious civil conspiracy can lie when 2 people agree to breach the same contract.

Petitioners filed separate appeals to the 11th Circuit and other important motions as well. All pending motions were denied, including the motion to take judicial notice of the decisions in the Florida state court case where ARTHUR's cross-claims for tortious interference and breach of contract against WEISS were dismissed and later abandoned by ARTHUR in the appellate stages, triggering res judicata and collateral estoppel finality in WEISS' favor which would have precluded the $688,000 award on Count 3 for the very same tortious interference claim. Under Fed. R. Evid. 201(d), it is mandatory for appellate panels to take

judicial notice when it is supplied with the Florida state court documents and decisions, which were supplied here.[1]

In addition, WEISS filed a motion for an order certifying questions to the Florida's Supreme Court to address questions regarding (1) statutory construction of Florida's remittitur of punitive damage statutes [Fla. Stat. §768.73 and §768.74]; (2) Florida's application of Florida's doctrine of res judicata of Florida cases which have been reviewed by a Florida appellate court; (3) statutory construction of Fla. Stat. §737.403 concerning the proper procedure for a testamentary trustee such as BERKETT to utilize when acting with an inherent conflict of interest with her beneficiaries insofar as seeking prior court approval of all self-interested conduct prior to settlement of any litigation involving that trustee in an individual capacity; (4) statutory construction of Fla. Stat. §737.302 concerning whether the conduct of a Florida trustee who is also a member of The Florida Bar is obliged to act in accordance with the ethical responsibility set forth in the Florida Rules Regulating the Bar as well as the "special skills" of a lawyer when serving as a fiduciary; and (5) whether a federal jury can find that an action which was filed by a trustee and was ultimately settled by her successor qualifies as "frivolous" or whether the designation of "frivolous" is reserved exclusively for the Florida judiciary to determine. The Florida Supreme Court was not given the chance to determine if the federal court gave Full Faith and Credit to its prior decisions regarding the parties. In essence, a federal civil jury of laypersons was allowed unbridled power to independently fact-find and overrule prior decisions by the Florida judiciary finalizing most of the parties' disputes.

The Eleventh Circuit affirmed the decision in its entirety except that it vacated the $500,000 punitive award

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[1]Indeed, unless judicial notice of the Florida state court decisions is taken by reading them, the panel would be hampered in reviewing the order disposing of post-trial motions and determining whether any verdict resulted in a recovery to a diversity plaintiff that "would be significantly larger than the recovery that would be tolerated in state court" as Gasperini requires.

on Count 13 and remanded for proceedings consistent with Fla. Stat. §768.73. The decision made no mention of BMW v. Gore, ___ U.S. ____ (1996) nor did it change the $550,000 punitive damage award on Count 3 (Tortious Interference) thus exceeding Florida's 3 to 1 cap, which would have meant $414,000. It did not apply §768.73.

Since the Fla. Stat. §768.73 provision for exceeding the presumption 3 to 1 cap hinges on what was erroneously presented to the jury for fact-finding and a BMW v. Gore standard did not otherwise secure the rights afforded under the Due Process Clause, remanding the case in its present status was unacceptable to Petitioners. By the phrase "$515,000 punitive damage judgment" the decision overlooks the transmutation of the Special Verdict against 2 defendants in favor of 2 plaintiffs, into a cloudy pronouncement of shared liability for separate judgments that lacks any clarity for further judicial resolution below. The petitions for rehearing/rehearing en banc were denied.

STATEMENT OF ANY FACTS NECESSARY TO ARGUMENT OF ISSUES

The dialogue between Judge Hoeveler and Ms. WEISS included: [DAY 2:] "...Judge Knuck denied his [ARTHUR COURSHON's] rehearing. We took appeal. They took no appeal in the tortious interference. This is the same claim to begin with in my opinion. I would like to show the document and we can... This is the problem. ... You cannot try something that is res judicata..." **"This is not the time to be discussing legal defenses and affirmative defenses ..."**[R19-115] "How shall we solve this before we get too far afield? Mr. Courshon has tried the same complaint, the exhibits, the rehearing motion...." **"Tried in state court?"** "Yes. The same claim of tortious interference. I can show you." **"Ihave not heard or seen that yet.... This is a legal question."** "Ihave a decision I can show you." **"We will get to that".** "I am trying to raise these housekeeping issues." **"This is not housekeeping."**

[DAY 3: Sidebar] **"That you can ask [ARTHUR COURSHON]" .."But not about the lawsuit because the lawsuit -- if what you are going to contend is that he has already presented these claims, and that he lost in**

another action -- is a legal matters, not one for the jury. You can develop with him what he thinks his claims are here but not in relation to that. That will have to be a separate matter that you will have to argue outside the presence of the jury." "Do you think we can do that now?" **"No, not now."**..."I don't know when I will get your attention." ..."**...you can produce these pleadings which I can take judicial notice of."** "Would you please?" **"You can ask me to. I probably may, and I have to determine whether or not it is a legal defense."** "Could I get the things in without questions?...And ask you to take judicial notice?" **"I will take judicial notice of any-thing in my Court record or I think I can take judicial notice of the record of the state court as well."** "I think you can also." (sidebar concluded). [R20-45-47]

[DAY 11:(WEISS CLOSING)] "Probate Court is essentially a place for wills, trusts, family matters, etc. Federal court usually is not."..."**Actually, what is going on over there or has gone on is only relevant as it has come into evidence.**" [R28-162] "...Every litigant, every person who thinks a contract that's been breached or interfered with or they have been damaged has a duty to mitigate. Mr. Courshon ---" (objection voiced) " I believe that's in the jury instructions, Your Honor" ..."**It is. It is included there, but we've got to talk about it because we've got to talk about whether or not it is implicit in any defense. We will do that.**" [R28-185-186]

DAY 12:"Your Honor mentioned that you would discuss mitigation. That was an instruction so I said it to the jury, and then that was something Your Honor mentioned to us." **"Well, I think that's implicit in the law."** "Okay" **"Whether it is plead or not, I think."**

ARGUMENT AND AUTHORITIES ON REASONS FOR GRANTING A WRIT OF CERTIORARI

FIRST ARGUMENT: There is a direct and intolerable conflict among the Circuits concerning the important issues of when and whether circuit courts should certify questions in diversity cases to the state's highest court where there is any doubt on state law.

As the Eleventh Circuit in Burger v. Time Ins. Co., 115 F. 3d 880 (11th Cir. 1997) stated when certifying:

> "Where there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary Erie "guesses" and to offer the state court the opportunity to interpret or change existing law." Mosher v. Speedstar Div. Johns-Manville Sales Corp., 781 F.2d 394, 396 (5th Cir.) cert. denied, 478 U.S. 1022, 106 S. Ct. 339, 92 L. Ed. 2d 743 (1986). We therefore certify the following question to the Florida Supreme Court."

Adding that "[o]ur particular phrasing of the question is not intended to limitthe Supreme Court's inquiry", the panel sent the entire record as well. There should have been certification here as well because the 11th Circuit should have realized that there was some doubt as to what the state of Florida law really was as well as whether Florida law was followed in every instance by the district court when considering the issue of punitive damages against the back drop of both state and federal law.

There is a conflict among the Circuits, and even within panels of such Circuits, with regard to whether and when a Circuit court should certify questions to a state's highest court when reviewing diversity cases. Some perform Erie "guesses" more than others.

As state judicial and statutory law has undergone extensive tort reform during the last decade, some federal courts have considered critical issues of state substantive law and venturing into new unexplored territory beyond that contemplated by both Congress and the Constitution.

This is a country of dual sovereigns. While some States (e.g. California) may intentionally eschew the opportunity to accept certification from the Court of Appeals, other States (e.g. Florida Constitution Article V, Section 3(b)(6)) embrace it. Some states' highest courts prefer to hear the cases it wishes to hear while exercising the power to decline hearing others. Jackson v. Johns-Manville Sales Corp., 781 F. 2d 394, 396 (Fifth Cir. 1986) ("Upon rehearing

en banc, we certified to the Mississippi Supreme Court three significant questions of Mississippi law... The Mississippi Supreme Court declined certification without discussion... The case is consequently back before us for resolution of the issues previously certified to the Mississippi Supreme Court.") The point is that states have a right that some federal panels neglect or usurp. This is such a case.

Like BMW v. Gore, this case concerns excessive punitive damages. The most distinguishing fact which sets this case apart from BMW v. Gore, however, is that (unlike Alabama), Florida is one of the states where the State Legislature has actually promulgated a 3-to-1 limitation on punitives in order to address the same issue of runaway punitives that Congress has now focussed upon.

It is an abuse of discretion for a federal appellate court to take multiple Erie "guesses" where a state like Florida accepts certification. And while the 11th Circuit may have found some appellate issues not preserved for appellate review because Petitioners did not formally retry the same exact factual issues that had previously resulted in finality in the eyes of the Florida courts long ago, that does not mean that the Florida judiciary would have required a second presentation to the trier of fact for decisions that were, indeed, "a matter of law" thus **requiring** judicial recognition by **all** courts.

Striking a proper balance between the dual sovereigns is not a novel balancing act. In the appendix to her dissent in BMW v. Gore Justice Ginsberg writes:

> "State legislatures have in the hopper or have enacted a variety of measures to curtail awards on punitive damages" [noting] "Fla. Stat. 768.73 (1)(a) and (b) (Supp. 1992) (in general, caps punitive damages at three times compensatory damages.)."

Justice Ginsberg seemingly believed that the States are to retain control over the destiny of punitive damage awards within their borders. Tort reform is a rapidly changing area of law. Federal courts overreach by taking Erie "guesses" when they allow federal diversity case jury verdicts to stand without an opportunity for judicial review by the state's

highest court whether there is legislation that is either promulgated or developing and a certification procedure.

Petitioners had litigated in state court for a decade. The COURSHONS has settled all of their same state claims with Petitioners' trustee BERKETT, whose position as a fiduciary in privity with Petitioners for Florida's *res judicata* purposes should have inured to Petitioners under Florida's law precluding the "splitting of causes of action". The federal judiciary is compelled to see that Florida law is scrupulously followed insofar as COURSHONS' state claims are concerned. Petitioners should not be burdened with presenting a case to a jury for fact-finding, where Florida judges already reached conclusions which result in law which the federal judiciary must notice and follow.

Appellate panels should not to deprive state courts of appellate review of state law questions. Yet the Supreme Court has not clarified this important issue of certification. Federal judicial decisions should be as clear, concrete and correct as possible. Decisions should reflect the aim of giving guidance to other litigants so their cases can be sooner resolved by summary judgment or settlement.

Without a clear pronouncement from this Court that novel issues in diversity cases should be certified for appellate review by a state's highest court, appellate panels are in a quagmire. Circuits, and panels that comprise them, are placed in an intolerable position between prejudicial deference to the 7th Amendment and searching for the "truth" of a state's own interpretation of its laws, its precedent, and its judicial destiny. Taking a "guess" usurps litigants' (and a State's) constitutional rights.

In any event, there is a strong likelihood that certification of questions to a state's highest appellate court would lead to a better-reasoned decision-making that would better serve the federal judiciary when the issue arose again.There are many fine points of Florida's own *res judicata* doctrine that were ignored here, particularly Florida's prohibition against "splitting" claims.

For example, Dade County v. Matheson, 605 So. 2d 469 (Fla. 3d DCA 1992) holds that if a party drops a claim in a first action and then later seeks to maintain a second

separate action on the abandoned claim, the rule against "splitting causes of action" precludes that party from maintaining a second suit. Since BERKETT settled as Petitioners' trustee, the element of privity is met here. Similarly, the COURSHONS had abandoned the tortious interference claim and the 11th Circuit panel denied WEISS' motion to take judicial notice under Rule 201(d) and would not even consider *de novo* review, as evidenced by the rather skimpy opinion. Had the case been tried in state court, there would have been 2 opportunities for appellate review. Here, there was really no appellate review. The panel's failure to note that 2 $515,000 judgments - not just 1 - exceeded BMW criteria in addition to the Count 3 $550,000 judgment, suggests a rather cursory review of the matter before it, as does the decision not to publish the opinion or direct that the district court adhere to BMW.

Since Florida substantive law should apply under Erie, Respondents' claims of tortious interference and breach of contract were already abandoned against Petitioners and could never have been resurrected in federal court for a jury's fact-finding. In any event, conflicts of law are reviewed *de novo*, Trumpet Vine Invest. v. Union Capital Partners, Inc., 92 F. 3d 1110, 1115 (11th Cir. 1996). A state's highest court is best suited to do that. Neither the district nor appellate court ever justified the decision reached and affirmed. It missed the point that Petitioners were not obliged to present a case to a jury for fact-finding where prior state decisions precluded such fact-finding by a federal jury. Petitioners just needed to present their case to the judge. They did.

SECOND ARGUMENT: The Eleventh Circuit departed from Supreme Court procedures because under the Erie Doctrine, Florida's dominant interest in having its substantive law guide allowable damages arising out of state claims for relief must be respected and is not inconsistent with the Seventh Amendment.

As the majority stated in Gasperini v. Center for Humanities, Inc., __ U.S.__, 116 S. Ct. 2211 (1996):

"Classification of a law as "substantive" or

> "procedural" for Erie purposes is sometimes a challenging endeavor...Guaranty Trust Co. v. York, 326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945), an early interpretation of Erie, propounded an "outcome-determination" test: "Does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" 326 U.S. at 109. ...the "outcome-determination test" ...[and] its application must be guided by "the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." Hanna v. Plumer, 380 U.S. 460, 468, 14 L. Ed 2d 8, 85 S. Ct. 1136 (1965)" * * *
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> "The role of the district court [in diversity cases] is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard. 492 U.S. at 279" [Browning-Ferris Indus. v. Kelco Disposal].

Although the Eleventh Circuit has recognized the need to be certain about the application of a particular state substantive law, it did not do so here. With the sweeping advances in the promulgation of tort reform legislation, and laws such as Fla. Stat. §768.73, the Supreme Court of Florida has attempted to develop a consistent and predictable interpretation and application consistent with other laws. The 11th Circuit had previously recognized that the Florida legislature's objectives are best determined by its own Supreme Court. Panels have certified Miele v. Prudential Bache Securities, 986 F. 2d 459 (11th Cir. 1993); Strochak v. Fed. Ins. Co., 109 F. 3d 717 (11th Cir. 1997); and Wood v. Eli Lilly,106 F. 3d 374 (11th Cir. 1997).

But the judiciary ignored its responsibilities to be "certain" and "predictable" here. The case was remanded with directions to follow Fla. Stat. §768.73. But why should the district court consider any "factors" to rationalize any award over $3 for Count 13? Ifthe 11th Circuit willcondone an award exceeding 3 to 1, a Florida Court must determine the procedural mechanism and the factors with which a judge may concern herself/himself in venturing beyond 3 to 1 for additional damages in a conspiracy count based upon the most tenuous $1 strand of compensatory damages.

While the Florida Legislature has been statutorily limiting punitive damages, the Supreme Court has put its own cap on exorbitant damages by outlining a test in BMW of N. America, Inc. v. Gore and limiting excessive damages in every state court through the Due Process Clause. Now Florida jury verdicts must be checked by §768.73 and double-checked by BMW. Gasperini at fn 12.

But the 11th Circuit did not even caution the district court to follow BMW. Florida's Supreme Court must have the chance to set out a framework for the federal judiciary in handling punitive damage awards in diversity cases.

Florida's common-law contract and tort claims require yet an additional check, for like most states Florida has its own version of the Economic Loss Rule that precludes a judgment in tort absent personal injury or property damage if the parties had a contractual relationship and did not allocate for that risk. Since Florida's Economic Loss Rule is still developing, its applicability can be uncertain, thereby necessitating a review by its highest court.

Because Florida's Economic Loss Rule is a judge-made rule, not promulgated legislation, its applicability is best determined by the Supreme Court of Florida. The 11th Circuit did not even mention this critical analysis, seemingly leaving it to the unfettered discretion of the district court to consider everything. In order for a federal appellate court to be "doubt-free" about the applicability of all of the foregoing Florida substantive law in complicated cases with multiple torts and contract breaches alleged against 2 parties with a history of 4 state law cases that have passed through the Florida State court system for over a decade, there must be

certification. The 11th Circuit disregarded Florida's dominant interest and the Erie doctrine when it denied the motion for certification.

THIRD ARGUMENT: Since the Florida Economic Loss Rule is substantive law which the Eleventh Circuit must apply under the Erie Doctrine, the Court erred by affirming the jury's fact finding on claims for which Petitioners had "tort damage immunity" as a matter of law

Gasperini sets requirements to ensure that federal appellate courts correctly apply the state substantive law that compels a post-verdict review of a jury award to determine excessiveness of an established claim. It is not the exclusive form of review. The Full Faith and Credit Clause and 28 U.S.C §1738 also compel federal courts to apply other state substantive law much earlier than the verdict stage, particularly if the delayed application may influence the jury in a way that would be "outcome-determinative".

In Saratoga Fishing Co. v. J.M. Martinac & Co., ___ U.S. ___, 117 S. Ct. 1783 (1997) the Court first used the phrase "economic loss rule" and **"tort damage immunity"**. Justice Scalia's dissent pertains directly to Florida law and recognizes that Florida is a state firmly wedded to the philosophy that contract and tort principles are distinct. If indeed a defendant is to have "tort damage immunity" under a correct application of Florida's Economic Loss Rule, then it logically follows that the judiciary must timely take judicial notice of the entire history of proceedings between the litigants in state court, particularly a Settlement document in the case that demonstrates full mitigation of contract claims. Since no punitive damages may arise for breach of contract, the verdicts in Counts 7 and 8 are excessive. A federal diversity case must also effectively apply Florida's Economic Loss Rule and Florida's *res judicata*-waiver-collateral estoppel rules **during the earliest possible stages** of trial in order to follow Erie and the cases in its path.

Full Faith and Credit requires an early judicial analysis, like in Morris v. Bischoff, 1997 U.S. Dist. LEXIS 3176 (M.D.Fla.1997) (3/4/97) ("A claim for wilful breach of

contract is still a claim for breach of contract and does not give rise to tort remedies, e.g., punitive damages, no matter how oppressive the breach.") and in Brufsky v. Parker Marine Enter., 1997 US Dist LEXIS 4065, (3/27/97) where one side alleges that the other fraudulently induced it to enter into a settlement agreement, while the other claims that the opposing party breached it.

When, as here, a trial judge sends questions of tort fact-finding to the jury and does not send a requested "mitigation of damages" instruction and refrains from "mitigation" as a matter of law based on the Settlement Agreement "of record", a judge abuses his discretion because he has engaged in an "outcome-determinative" application of procedural and substantive law that necessarily deviates from Erie and its progeny and defeats the "tort damage immunity" (and *res judicata* immunity) to which defendants are entitled at the **earliest possible** stage of civil litigation in Florida courts, not after a jury verdict.

FOURTH ARGUMENT: The Eleventh Circuit incorrectly affirmed the District Court's utilization of a federal criminal conspiracy analysis in a case where the Florida civil conspiracy law should have been applied, and thus transgressed a variety of constitutional safeguards.

As both federal courts recognized, the Special Verdict awards in Count 13, each $1 compensatory and originally $1,015,000 punitive, are insupportable. They are unreasonable under Fla. Stat. §768.73 and §768.74. By law, these punitives awards cannot exceed $3 per §768.73.

Florida's "Economic Loss Rule" precludes recovery for civil conspiracy related to breach of contract. Only another civil tort in Florida gives rise to a civil conspiracy. Williams Elec. Co., Inc. v. Honeywell, Inc., 772 F.Supp. 1225, 1239-1240 (N.D. Fla. 1991). The Court declined to consider this and/or so instruct although Petitioners repeatedly referred to Florida's Economic Loss Rule, citing to Judge Hoeveler's own 11th Circuit opinion in Jones v. Childers, 18 F. 3d 899 (11th Cir. 1994). There was no proof that the purpose of Petitioners' joint conduct was an unlawful tort. There is no "Civil Conspiracy" tort in New

York, where both Petitioners have lived since June 1984. 20 N.Y. Jur.2d Conspiracy-Civil Aspects §1 and §4.

Florida's interest in being a conspiracy-and defamation-free state cannot legitimately include preventing New York beneficiaries from preparing counterclaims or petitions for accounting against former Florida trustees of a Florida trust. Nor can Florida convert defamation in Georgia (OCC) or California (cc: Mrs. BERKETT) into Florida state claims which plaintiffs can one day claim somehow hurt them in Florida. With no guidelines to narrow the focus in any 3 to 1 rebuttal of a presumptive cap on punitives, Florida has gone far beyond any legitimate and constitutional interest in punishing Petitioners' out of state conduct.

Judge Hoeveler found that the jury could have correctly concluded that "...the conspiracy was necessarily an amalgamation of other counts in the complaint", and that two reduced punitive awards bearing a new 515,000 to 1 ratio could somehow be justified because Petitioners had engaged in a general conspiratorial "pattern of malice" as the COURSHONS' counsel contended.

The precise conduct constituting federal "criminal conspiracy" has not been identified with enormous clarity, leaving Circuit Courts to extrapolate the standard from a series of "cert denied". U.S.A. v. Johnson, 54 F.3d 1150 (4th Cir. 1995) explains

> "In order to support a conviction for conspiracy, the government must show, first, that a conspiracy existed; then, that the defendant had knowledge of the conspiracy; and finally, that the defendant voluntarily became a part of the conspiracy." *United States v. Bell*, 954 F.2d 232, 236 (4th Cir. 1992), cert. denied, 114 S. Ct. 112 (1993). Circumstantial evidence may be used to prove the existence of a conspiracy. Id. at 236. Moreover, a defendant can be convicted of the conspiracy charged in the indictment. See *United States v. Hines*, 717 F.2d 1481, 1490 (4th Cir. 1983), cert. denied, 467 U.S. 1214, and 467 U.S. 1219 (19874). In *United States v. Crockett*,

> 813 F.2d 1310, 1316-17 (4th cir.), cert. denied, 484 U.S. 834, and 113 S. Ct. 2384 (1993), this court noted the distinction between a single conspiracy, with different parties joining and leaving at different times, and multiple conspiracies.
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> * * *
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> One may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence. ....*Banks*, 10 F.3d at 1054."

While such loose definitions of federal **criminal** conspiracy allow a federal jury to convict based upon some hypothetical linkage amongst criminal defendants based purely on circumstantial evidence, a federal court sitting in a diversity action abuses its discretion when allowing a jury to consider **civil** counts which are forbidden to be considered as a predicate for **civil** conspiracy.

Williams Elec. Co. v. Honeywell, Inc. makes it clear that Florida civil conspiracy can only exist where there has been a tortious act in Florida. A federal judge cannot permit a jury to consider "malice" or contract "breaches" in the abstract. In POLLAK's case, the jury could have only considered POLLAK's sole tort of "intentional inflectional of emotional distress" amounting to $1 in compensatory damage and $1 in punitive damage. Given that such awards were extremely *di minimus* under any standard including Farrar v. Hobby, 506 U.S. 103 (1992), the 11th Circuit should have reversed any award above $3 on Count 13 rather than remanding for "further findings of fact." The single material fact is already abundantly apparent -- where total tort damages are less than five dollars, and BMW v. Gore's Due Process analysis precludes any exception to the presumptive excessiveness of the jury verdict, a federal court sitting in diversity is not constitutionally permitted to rely upon its own interpretation of the federal criminal conspiracy statutes, usurp the well-established state legislature and judicial law, and find facts based upon events other than the underlying tort award being under $5.

FIFTH ARGUMENT: The Eleventh Circuit incorrectly affirmed a district court civil procedure that incorrectly decided all federal questions concerning Petitioners' First Amendment rights of speech and petition by allowing the jury to determine whether or not presumptive privileges existed as a matter of law.

This case has several First Amendment issues and the merits panel, without much of an opinion, affirmed the District Court's erroneous manner of handling all of the First Amendment issues. The 11th Circuit's affirmance without a published opinion of another Southern District of Florida First Amendment case was reversed in 1993 (Church of Lukumi Babalu Avenue v. Hialeah, 508 U.S. 520, 113 S. Ct. 2217 (1993)) so the absence of a panel opinion does not preclude granting a writ of certiorari.

Although Defendants' Pretrial Stipulation emphasized the First Amendment issues and WEISS spoke about jury instructions in defamation cases even before jury selection [R18-20], the judge advised that Plaintiffs were not yet required to serve jury instructions. Plaintiffs' Pretrial Stipulation cited to McDonald v. Smith, 472 U.S. 479, 105 S.Ct. 2787 (1985) [R16-559-10], but the court declined to recognize that the right to petition a governmental regulatory body ("OCC")was a constitutionally protected right that was presumptively privileged and a letter cannot constitute "actionable defamation" absent "actual malice." WEISS argued that the "petition" may be about an individual's private matter and that the "directed to a government concerning a public issue" requirement, which Judge Hoeveler instructed about, is met so long as the private concern is of the type covered by the letter recipient's official duties. The McDonald court wrote:

> "Under state common law, damages may be recovered only if petitioner is shown to have acted with malice; "malice" has been defined by the Court of Appeals of North Carolina, in terms that court considered consistent with New York Times Co. v. Sullivan, 376 U.S. 254 (1964), as 'knowledge at the time that the words are false, or...without probable cause or

without checking for the truth by the means at hand. Dellinger v. Belk, 34 N.C. App. 488, 490, 238 S.E. 2d 788, 78 (1977). We hold that the Petition Clause does not require the State to expand this privilege into an absolute one. The right to petition is guaranteed; the right to commit libel with impunity is not." Id. at 485.

In contrast to McDonald, Judge Hoeveler wrote:

"Writing a regulatory body such as the Comptroller of the Currency does not convert what would otherwise be common -law defamation into constitutionally-protected speech. Holding otherwise would turn the First Amendment into a mightier shield than originally intended. Accordingly, the Court is of the opinion that it should not have instructed the jury as to actual malice."

Although McDonald distinguished between an "absolute privilege" and a "qualified privilege", it nevertheless reaffirmed the New York Times "actual malice" standard as the correct First Amendment qualified privilege for speech to a governmental body/officer. This issue is a matter of law. Neither the Special Verdict form for Counts IX & X nor the jury instructions # 30 and 31 provided for the jury to consider and decide whether WEISS acted with "knowledge of the falsity" or "reckless disregard for the truth or falsity."

The Court's failure to recognize the First Amendment under the Petition Clause also led to a jury instruction containing the wrong standard of review for punitive damages. "Clear and convincing evidence" of the NY Times "actual malice" was required for punitive damages, not just "a preponderance" as instructed. WEISS lost far more than $2 on this Count X for defamation. WEISS lost her constitutionally protected First Amendment rights. And the jury used that incorrect analysis as a springboard for other adverse verdicts against both Petitioners.

Because WEISS insisted that the "actual malice" standard be used in the jury charge and Special Verdict form and because the Form did not ask the jury to determine whether or not WEISS acted with "actual malice" --

knowledge of falsity or reckless disregard of the truth or falsity -- by "clear and convincing evidence", the verdict was prejudicially tainted by a disregard for the Constitution.

In a similar vein, WEISS's letter to Mr. Davis on her professional letterhead was a protected exercise of her right to speak freely to another attorney about pre-trial discovery matters in a pending litigation matter. In addition to being *pro se* for her own beneficial interest in a trust which was directly involved in a pending litigation, there was a commonality of interests that financially impacted upon a testamentary trust in which both she, her mother and her siblings held beneficial interests.

The practice of law is accompanied by certain privileges for lawyers to speak to one another in a manner that would otherwise be actionable as defamation. The goal is to ensure diligent advocacy as well as promote settlement by open communication amongst members of the bar in matters of pending civil litigation. In a real sense, this advocacy/settlement dichotomy is an "issue of public concern" because it is through ethical regulation that attorney communications can be sufficiently predictable in the best interest of the profession, which is virtually self-policing. New York reviewed this attorneys speech privilege in Caplan v. Winslett, 637 N.Y.S.2d 967(1st Dpt. 1996): "An absolute privilege [for defamation] is based upon a communicator's official participation in the process of government....It is intended to insulate him from any inhibitions in carrying out that function.... While there is room for interpretation as to what constitutes participation in a judicial governmental proceeding, attorneys are considered as much protected participants in this process as are judges, jurors, parties and witnesses. Lawyers "are granted this protection for the benefit of the public, to promote the participants. Thus...a lawyer has immunity for defamatory words spoken in a judicial proceeding ...The immunity does not attach solely because the speaker is an...attorney,...but because the statements are, in the words of Lord MANSFIELD,'spoken in office' ...As Judge Cardozo noted...an attorney is entitled to the same immunity as any other participant in judicial proceeding. Furthermore, the

privilege is not limited to statements made in open court, but also embraces communications between attorneys. Klein v. McGauley, 29 A.D.2d 418, 420, 288 N.Y.S.2d 751. ["As a matter of policy, attorneys should be given maximum freedom in the quest for justice for their clients (Restatement [Second] of Torts §586). Although the privilege will not protect gratuitous statements uttered wholly "outside the cause", we have long been guided by the rule that "no strained or close construction willbe indulged in to exempt a case from the protection of privilege".... As long as the subject of an out-of-court communication relates to pending or contemplated litigation, and is made in connection with a judicial proceeding...it furthers an interest of social importance and should be protected. Libco Corp. v. Adams, 100 Ill.App. 3d 314, 317, 426 N.E.2d 1130, 1132, 55 Ill.Dec. 805. n.2. Discussion between attorneys representing opposing parties tends to conserve judicial and client resources by limiting issues, and might even resolve the litigation; if anything, this should be encouraged. (Dean v. Kirkland, 301 Ill.App. 495, 23 N.E.2d 180, 188)"].)

The Supreme Court has repeatedly recognized the public concern component of attorneys out of court speech in both the criminal and civil context. See Gentile v. Nevada, 501 U.S. 1030 (1991) and Bates v. State Bar of Arizona, 433 U.S. 350, 376 n.32 (1977). Judge Hoeveler was unconvinced that WEISS' speech was presumptively entitled to a privilege. Yet the letter need not reflect political dogma to qualify for the broad protection afforded speech amongst attorneys about pending litigation.

Finally, the "scurrilous attack" sanctions was too prejudicial to be evidence for a jury. State sanctions for the content of civil pleadings have the "chilling effect" of prior restraint, antithetical to the First Amendment. In Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 643, 105 S.Ct. 2265 (1985), the Supreme Court noted the State is not entitled to interfere with a citizen's access to the courts: ("But we cannot endorse the proposition that a lawsuit as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances,

resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action" Bates v. State Bar of Arizona, 433 U.S., at 376. That our citizens have access to our system of justice is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access...")

Here, Florida acted unconstitutionally twice. First, without holding an evidentiary hearing and relying solely on a Florida Bar case, it imposed a $1500 sanction on non-parties POLLAK(a non-lawyer) and WEISS (a lawyer neither admitted in Florida nor *pro hac vice*) for criticism about a court-appointee directed to decide legal issues pertaining to them (Weiss v. T/U/W Albert Pollak, 595 So. 2d 1035 (Fla. 3d DCA 1992). Next, Fla. Stat. §768.73 does not expressly prohibit the next judge from viewing the in-court pleading as a conspiratorial act in a "pattern of malice", thus reposing discretion in another judge to consider it in rebuttal of the 3 to 1 punitive damages cap.

As the decision in Standing Committee v. Yagman 55 F.3d 1430 (9th Cir. 1995) explains, the Due Process Clause and two separate First Amendment standards apply to an attorney's right to criticize the judiciary without exposure to "sanctions", inasmuch as there are substantial issues of "public concern" in having an impartial system of justice. Respondents prejudicially introduced evidence of state "sanctions", in violation of Petitioners' Amendment I rights.

Since the "sanctions" of $1,500 had been imposed against Petitioners while *pro se* litigants who were not members of the Florida Bar, they were erroneous to begin with. Since the Florida state court's determination was not fairly supported by the record as a whole and was entered without any opportunity for an evidentiary hearing affording Petitioners a chance to prove through testimony that the critical statements were factually grounded, the decision was

antithetical to both Yagman and the First Amendment. It was not entitled to a presumption of correctness in federal court.

There were a number of other technical reasons why a judgment for Florida defamation could not have been entered and upheld. The letter forming the basis of the claim could not have been determined to be malicious if the judge has recognized the element of public concern as a matter of law and afforded a presumptive qualified privilege. There is a substantial public concern regarding "coaxing" of witness testimony, thus permitting both common interest privilege and triggering First Amendment concerns. See Butterworth v. Smith, 494 U.S. 624, 633-4 (1990).

Respondents' own oral testimony as to speculative "lost profits" (as a result of their alleged inability to practice law because they could not obtain malpractice insurance) isn't competent and substantial evidence either under Florida law. See Daniel Intern v. Better Const., 593 S.2d 524 (Fla. 3d DCA 1991).

Even the verdict in the tortious interference count is tainted by 1st Amendment improprieties because that conduct was nothing more than communicative "speech" to another attorney concerning a title matter that had been quite obviously overlooked even though the Trust Agreement effecting title was recorded in the public records.

And because there was a contractual relationship established amongst the parties torts such as "tortious interference" and "defamation" were virtually precluded under Florida's Economic Loss Rule which provides "tort damage immunity".

SIXTH ARGUMENT: The Eleventh Circuit transgressed the Due Process Clause safeguards because it did not take judicial notice of Florida decisions between the parties nor correctly follow Florida's choice of law doctrine and therefore selected the wrong law to apply this case.

Petitioners became trust beneficiaries while still Floridians, lived in California for 2 decades, and moved to New York. The General Releases were executed in Calif. The alleged defamation of which WEISS was accused

involved interstate mailing of a copy of a letter to her mother BERKETT in California about events that occurred in Colorado. This purported defamatory communicative act allegedly breached an Agreement to Continue a Partnership (which nevertheless continued in accordance with the regulations promulgated under Internal Revenue Code §708 and General Releases, which were void under Calif.Civil Code §1542 in any event.) Such speech is presumptively federally protected and Florida law cannot prohibit it and lead to $250,000 in damages.

There was no legally sufficient evidence of damages caused by defamation nor can an independent claim of emotional distress exist. See Hammer v. Slater, 20 F.3d 1137, 1144 (11th Cir. 1994) (threatening to file a lawsuit and filing one cannot cause "emotional distress" because it is not outrageous). See also Fridovich v. Fridovich, 598 S.2d 65 (Fla. 1992) (which cited Anderson v. Rossman & Baumberger, P.A., 440 So.2d 591, 593 (Fla. 4th DCA 1983) (finding no cause of action for intentional infliction of emotional distress where the "primary" conduct relied on was defamatory statements in court pleadings), review denied, 450 So.2d 485 (Fla. 1984) held:

> "In short, regardless of privilege, a plaintiff cannot transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as outrageous."

There was no evidence of the requisite severe emotional suffering to sustain an emotional distress claim under Florida law, and where speech is concerned federal courts must be very careful to eliminate excessive claims and preclude them from jury consideration. See Ayers v. Wal-Mart Stores, Inc., 941 F. Supp. 1163, 1167 (M.D.Fla. 1996). Actually, had this been done, then the entire Count 13 consideration would have been entirely moot.

Under Trumpet Vine, Florida's choice of law doctrine required California Civil Code §1542 to be the controlling authority for "general releases" and California's one-year defamation statute to be controlling for BERKETT's receipt of WEISS' letter.

Essentially, $250,000 in damages arose against WEISS because she sent her own mother a copy of letter to the COURSHONS' attorney about the manner of handling witness testimony in a pending lawsuit in which all the parties hereto had a common and familial interest. This letter could not possibly have caused the COURSHONS to abandon their law practice because they could not obtain legal malpractice insurance as they alleged. Florida has no extra-territorial interest in any such California speech.

SEVENTH ARGUMENT: The Eleventh Circuit incorrectly affirmed many prejudicial errors by the District Court, all of which cumulatively prejudicially tainted the federal civil proceeding and compel a new trial.

Over the course of a decade of federal litigation, culminating with the trial, there were a variety of prejudicial errors which tainted these federal civil proceedings.

No federal magistrate was ever appointed and the Special Master appointment violated Fed.R. Civ. P. 53(b) criteria. Despite Petitioners' repeated requests for a federal magistrate which is mandatory in the Miami Division, oddly none was appointed here even after the special master died. Motions would remain undecided for 3 or 4 years. Discovery concluded 4 years before trial and yet the Court prejudicially permitted Respondents' "pattern of malice" evidence to include more recent matters which could not have been discovered after discovery was fully concluded.

Although BERKETT testified that she paid "Patty's share and Tommy's share" of damages for a "global settlement" [R. 22-33], and such prior receipt of monies surely mitigated 100% of the alleged breach of contract damages attributed to POLLAK as well as the tort damages of ten dollars attributed to POLLAK, the Court declined to consider mitigation as a matter within its judicial obligation. The Settlement Agreement which covered this case and some state litigation was a part of this Court's files reciting Judge Hoeveler's jurisdiction for enforcement. Fed. R. Evid. 201(d) requires the Court to take judicial notice of the Settlement Agreement provided to it and it is mandatory under Rule 201(g) for the Court to instruct the jury to accept

as conclusions any fact judicially noticed.

And even if the punitive damages awards against Petitioners could not be apportioned, they surely should properly have been set-off against payments made by co-defendants who contributed and settled. Dykes v. Raymark Industries, 801 F. 2d 810, 815 (6th Cir. 1986).

Although the COURSHONS testified that they never disclosed the broker's lawsuit to Petitioners when securing General Releases executed by them in California, the Court chose Florida law over California law to govern the Breach of General Release claim. It also refused to allow WEISS' good faith testimony mentioning that malpractice insurance agreements would have covered the COURSHONS' conduct, although Rule 411 was inapplicable because the COURSHONS were not the defendants.

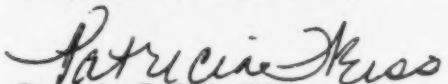
And most problematic was the Court's erroneous introduction of Respondents' wholly unauthenticated damages summary chart, which should have been precluded under Evidence Rule 1006. 5 Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence §1006[07] (1992) (distinguishing between use of summaries as evidence under Rule 1006 and use of pedagogical devices that summarize or organize previously admitted evidence) See U.S. v. Baker, 10 F. 3d 1374 (9th Cir. 1993) Affirmance of such a non-admissible pedagogical chart is in direct conflict with Fla. R. Evidence §90.956's procedures which require far more additional safeguards than occurred in this federal court in order to present legally sufficient evidence.

WEISS' indemnification cross-claims against BERKETT were also prejudicially dismissed, which was unjust since this single trial should have resolved matters in toto.

CONCLUSION

Petitioners respectfully request that the Court grant the Petition. The case conflicts with the Court's espoused views in important areas and was wrongly decided. Re-examination of this diversity case would assist the judiciary as to how to best meet the "twin goals" of Erie: avoidance of forum shopping and a consistent application of state law that avoids "Erie guesses" in Florida, which accepts certificated state law questions.

Respectfully submitted,



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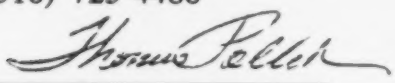

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petition.wr2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5414

D. C. Docket No. 86-394-CIV-HOEVELER

DO NOT PUBLISH

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL - 1 1997
MIGUEL J. CORTEZ
CLERK

ARTHUR H. COURSHON and JACK R. COURSHON, each individually as trustees of the Aaron Courshon and Paul Pollak Trusts, as former managing partners of the Thunderbird Partnership, and as beneficiaries of the Aaron Courshon Trust,

Plaintiffs-Appellees,

versus

PATRICIA POLLAK WEISS, individually, and as co-conspirator, and as the purported successor trustee and beneficiary of the Albert Pollak Trusts,

Defendant-Appellant,

PHYLLIS POLLAK BERKETT, JAMES POLLAK, GAIL POLLAK BARIL,

Defendants,

THOMAS POLLAK, each individually, as co-conspirators, and as beneficiaries of the Albert Pollak Trusts,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(July 1, 1997)

Before ANDERSON and BIRCH, Circuit Judges, and WOODS*, Senior District Judge.

PER CURIAM:

The judgment of the district court is affirmed in all respects except with respect to the punitive damages judgment on Count 13.[1] The court's review under Fla. Stat. 763.73 is hampered by inadequate findings of fact. The $515,000 punitive damages judgment in Count 13 is vacated and that issue is remanded to the district court for further findings of fact.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

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*Honorable Henry Woods, Senior U.S. District Judge for the Eastern District of Arkansas, sitting by designation.

[1] All other claims on appeal were either not properly preserved for appeal or are wholly without merit (and some are clearly frivolous). All pending motions are denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-0394-CIV-HOEVELER

FILED BY "s/_____" D.C.
OCT 6 - 1995
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

ARTHUR H. COURSHON and JACK R. COURSHON, each Individually, as Trustees of the Aaron Courshon and Paul Pollak Trusts, as Former Managing Partners of the Thunderbird Partnership, and as Beneficiaries of the Aaron Courshon Trust,

Plaintiffs,

v.

PATRICIA POLLAK WEISS, Individually, as a Co-Conspirator, and as the Purported Successor Trustee and Beneficiary of the Albert Pollak Trusts, and PHYLLIS POLLAK BERKETT, JAMES POLLAK, GAIL POLLAK BARIL, and THOMAS POLLAK, each Individually, as Co-Conspirators, and as Beneficiaries of the Albert Pollak Trusts,

Defendants.
_____/

ORDER DISPOSING OF POST-TRIAL MOTIONS

THIS CAUSE comes before the Court upon Defendants Patricia Pollak Weiss ("Weiss") and Thomas Pollak's ("Pollak") 1) Motion for a Judgment as a Matter of Law and Renewed Motion for a Directed Verdict, 2) Motion for a Mistrial and New Trial, 3) Motion for an Order for Findings of Fact and Conclusions of law for Remittitur, Set-offs, offsets and Mitigation of Damages, 4) Motion for Rule 11 Sanctions against All Plaintiffs and Steel, Hector & Davis, 5) Motion for an Order Staying Execution of or any Proceeding to Enforce the Judgment, and 6) Emergency Motion for Immediate Mediation.

These multiple motions stem from a two-week trial conducted by the Undersigned in February and March, 1995. The jury found Defendants liable as to every count of the complaint, and awarded Plaintiffs $598,006 in compensatory damages and $1,565,000 in punitive damages against Weiss, and $210,003 in compensatory damages and $1,015,002 in punitive damages against Pollak. Defendants raise a multitude of grounds for relief, most of which lack any merit or have already been ruled upon by this Court. Given the breadth of the pleadings, the Court will not undertake to address every issue raised by the defendants, but makes the following rulings:

Motion for a Judgment as a Matter of Law and Renewed Motion for a Directed Verdict

Defendants assert, once again, that Plaintiffs' actions are barred on res judicata and collateral estoppel grounds as a result of the disposition of state-court litigation. During several junctures of the trial, the Court entertained argument on this point and eventually ruled that Plaintiffs' actions were not barred. The Court's ruling stands.

With respect to Count III, Defendants argue that there is no

competent and substantial evidence to support the jury's verdict on the tortious interference count. The Court disagrees, finding that there was sufficient evidence for the jury to conclude that Weiss tortiously interfered with the balloon payment which the Farkas group was to make to Arthur Courshon, as Trustee. Her letter requesting direct payment to her was the direct cause of the Farkas Group's decision to interplead the funds. Moreover, Plaintiffs presented adequate evidence of the damages which they suffered.

With respect to Count VII, Defendants present several legal arguments why they did not breach the general agreement to continue the partnership agreement. None of them have merit, and there was sufficient evidence for the jury to find Defendants liable on this Count.

There was also sufficient evidence for the jury to find that Defendants breached the general releases which they granted to the Courshons when the Courshons resigned as Trustees of the Albert Pollak Trust. It was appropriate for the jury to conclude that Defendants' commencement of state court actions against Plaintiffs was a breach of these releases. Moreover, there is no basis to Defendants' assertion that the jury did not follow jury instruction number 28. This instruction states that a release is not enforceable if it is obtained through concealment or the omission of a material facts. It was up to the jury to resolve the factual question of whether the release was enforceable; the court will not upset its finding against Defendants. Finally, as a novel interpretation of contracts law, Defendants even argue that a release is not "technically a 'contract' per se" and therefore cannot be breached. The Court is not aware of any legal authority for this proposition of law.

With respect to Counts IX and X (defamation), Weiss raises, throughout Defendants' post-trial motions, numerous objections to the adequacy of the evidence and the jury instructions. The court is satisfied that there was sufficient evidence to support the jury verdicts and that the jury was properly

instructed. The Court will address all of Weiss' objections to the defamation counts in this section of the Order.

In Count IX, the jury found Weiss liable for writing a letter on March 3, 1984 in which she accused Plaintiffs of unethical conduct as lawyers. She stated that Plaintiffs had violated ABA Code of Professional Responsibility Disciplinary Rule 7-104 by meeting with Phyllis Berkett and Thomas Pollak, both of whom were represented by counsel not present at the meeting. She suggested that she would report them to the Florida State Bar if such an incident should occur again. They jury awarded each Plaintiff $125,000 in compensatory damages and $1.00 in punitive damages.

In Count X, the jury found Weiss liable for publishing a letter, dated June 3, 1985, to the Office of the Comptroller of the Currency. In the letter, Weiss accused Plaintiffs of maintaining funds of the Thunderbird Partnership in interest-free checking accounts at the Jefferson National Bank. At the time of these alleged violations of law, Plaintiffs were acting as fiduciaries of the estate of Paul Pollak as well as Directors of the Bank. Weiss requested that the Office of the Comptroller of the Currency commence an investigation. At trial, the jury found Weiss' statements to be false, and awarded each plaintiff $1.00 in compensatory damages and $1.00 in punitive damages.

Weiss raises several objections to the jury instructions which this Court delivered. As an initial matter, the Court should comment on how the jury instructions were composed. Although Plaintiffs submitted their own instructions on defamation, the Court found these instructions to be inadequate and revised them substantially. In drafting the defamation instructions, the Court tracked the language of the Florida Standard Jury Instructions in Civil Cases. See Fla. Std. Jury Instr. (Civ.) MI 4.4. These instructions were drafted by the Supreme Court Committee on Standard Jury Instructions in Civil Cases and adopted by the Florida Supreme Court in 1994. As the Court viewed the case,

the defamation question fell squarely into the "Private claimant, nonmedia defendant with or without qualified privilege" category. It therefore relied upon the language contained in section MI 4.3 of Florida Standard Jury Instructions in Civil Cases.

Weiss asserts that the Court erred by not giving a First Amendment "actual malice" instruction, i.e. the jury must find that Weiss knew the statements were false or had serious doubts as to their truth. This type of instruction is appropriate in a case involving a public official or public figure claimant, see Fla. Std. Jury Instr. (Civ.) MI 4.1, but not in a case, such as this one, involving private claimants. The 11th Circuit has stated:

> The test for determining liability in a defamation case turns on whether the libeled party is a public or private figure and on whether the defamatory publication addresses a public or private concern. If the injured party is a public figure or official and the defamatory material involves issues of legitimate public concern, the plaintiff must prove malice to establish liability.

Silvester v. American Broadcasting Companies, Inc., 839 F.2d 1491 (11th Cir. 1988) (emphasis added).

First, Plaintiffs in this case were not public figures or officials, but rather private bankers and lawyers. They have not "assumed roles of especial prominence in the affairs of society," nor have they "thrust themselves to the forefront of particular public controversies." Gertz v. Welch, 418 U.S. 323, 345 (1974). See Rety v. Green, 546 So.2d 410, 425 (Fla. App. 3 Dist. 1989) (holding that a private businessman who owns a restaurant is not a public figure). Second, neither of the letters written by Weiss in Counts IX and X addressed legitimate issues of public concern. These letters were written as part of Weiss' on-going feud with Plaintiffs, and were attempts to injure and embarrass Plaintiffs in their capacity as lawyers and bankers. In short, they grew out of a private, internecine dispute whose relation to legitimate issues of

public concern was tangential at best. Civic spirit was not the motivating animus behind these defamatory statements; the public derived no social utility from their publication.

Weiss has repeatedly argued that her statements were constitutionally-protected because she has a right to petition the government to redress grievances. The Supreme Court, however, has held that the right to petition, embodied in the First Amendment, is not an absolute one. "We are not prepared to conclude ... that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right ... For example, filing a complaint in court is form of petitioning activity; but baseless litigation is not immunized by the First Amendment right to petition." McDonald v. Smith, 472 U.S. 479, 484 (1985).

Writing a public regulatory body such as the Comptroller of the Currency does not convert what would otherwise be common-law defamation into constitutionally-protected speech. Holding otherwise would turn the First Amendment into a mightier shield than originally intended. Accordingly, the Court is of the opinion that it should not have instructed the jury as to actual malice.

Weiss argues that the Court failed to instruct the jury on all six elements of defamation, including an instruction regarding defamatory effect. In making this argument, Weiss is presumably referring to the commercial, non-standard jury instructions, which list six elements for defamation. See Matthew Bender & Co., Florida Jury Instructions, § 54.02. The Court believes that the standard jury instructions are the appropriate legal authority and that they adequately convey the elements of defamation.

Weiss next argues that the Court failed to instruct the jury that Plaintiffs must prove defamation by "clear and convincing evidence." The Court, however, does not believe that either the United States Constitution or the Florida law require this

heightened burden of proof in a case of this nature. In Nodar v. Galbreath, the Florida Supreme Court stated:

> Express malice under the common law of Florida, necessary to overcome the common-law qualified privilege, is present where the primary motive for the statement is shown to have been an intention to injure the plaintiff ... The Plaintiff need only show this fact by a preponderance of the evidence, the ordinary standard of proof in civil cases."

462 So.2d 803, 805-06 (Fla. 1984) (emphasis added).

In Defendants' Motion for Rule 11 Sanctions against Plaintiffs and Steel, Hector and Davis, Weiss relies upon Waters v. Churchill for the contention that clear and convincing evidence is the proper evidentiary standard. 114 S.Ct. 1878 (1994). This Supreme Court case is off-point because it involves an entirely different factual scenario -- the discharge of a governmental employee as a result of speech uttered by the employee. Interestingly, the Court's holding in this case does not even address the question of what burden of proof is required in a state defamation case.[1]

Weiss also argues that in order to recover punitive damages for defamation, Plaintiffs must prove actual malice. Her reliance upon Rabren v. Straigis is misplaced because in that case, the Florida court stated, "If allegedly defamatory statements involve

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[1] In another case, the Supreme Court refused to take a position on the question of whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678 n.2 (1989) (holding that in a libel suit brought by a public official against a newspaper, the plaintiff must prove actual malice by clear and convincing evidence).

a matter of public concern, punitive damages can be recovered only if actual malice is shown ... The actual malice requirement applies regardless of whether Plaintiffs are deemed to be public figures or private figures, if the statements relate to a matter of public concern." 498 So.2d 1362, 1363 (Fla.App. 2 Dist. 1986). As indicated above, the Court does not believe that Weiss' statements in either Counts IX or X implicate questions of public concern, and it was therefore unnecessary for Plaintiffs to prove actual malice in order to recover punitive damages.

The March 3, 1984 letter in count IX was addressed to Alvin B. Davis, counsel for Plaintiffs, and a carbon copy was sent to Phyllis berkett, Thomas Pollak, Allan M. Glaser and Robert S. Forbes. Weiss maintains that at trial, Plaintiffs failed to prove the element of publication because they did not prove that Pollak, Glaser and Forbes received and read the letter. By her own admission, Weiss acknowledges that Berkett read and received the letter, but argues that this fact is irrelevant because Berkett did not believe the letter and thus, there was no defamatory effect. The Court finds that Berkett's reading the letter was sufficient to establish the element of publication.

Finally, the Court finds that there was sufficient evidence for the jury to award damages against Weiss based upon the publication of the letter.

Weiss also maintains that Count IX is barred by the California's one-year statue of limitations for defamation. Cal.Code Civ. Proc. § 340(3). The letter is dated March 3, 1984, and Plaintiffs did not file their first complaint until February 24, 1986. Resolution of this issue turns upon whether the statute of limitation of California or that of Florida applies to this action. Under Florida law at the time that the letter was written, the statute of limitation for defamation was four years. Fla. Stat. § 95.11(4) (o) (1980). The Florida legislature has subsequently reduced the time period to two years. Fla. Stat. § 95.11(4) (g) (1986). Under either calculation, the defamation action was filed

in a timely manner in Florida.

In order to determine which state's statute of limitations to apply, Florida's borrowing statute necessitates that the Court decide where the cause of action for defamation arose. Fla. Stat. 95.10. In making this determination, Florida's courts apply the significant relationship test and analyze which state has "the most significant relationship to the alleged libelous act and the parties." Bates v. Cook, 509 So.2d 1112, 1115 (Fla. 1987). In this case, it is clear that Florida has the most significant relationship to the present action. The letter stems from a family dispute involving property and trusts located in the state of Florida. Plaintiffs, the subjects of the letter, were residents in Florida. The letter was addressed to Plaintiff's counsel at a business address in Miami, Florida. It was also sent to Allen Glaser, counsel for Coconut Grove Bank (in Florida), and Robert S. Forbes, Senior Vice President at the Coconut Grove Bank. Finally, Plaintiffs incurred damages in Florida as a consequence of the letter. In arguing that the California statute of limitations applies, Weiss asserts that the letter was sent from Beverly Hills, California and that Phyllis Berkett and Thomas Pollak received the letter in California. The fact that the letter was sent from California or received by two other people in California does not make California's statute of limitations controlling. For all of these reasons, the Court finds that Florida's statute of limitations applies and that Count IX is not time-barred.

With respect to Count X, Weiss incorrectly asserts that the Court erred by submitting to the jury the question of whether Weiss possessed a qualified privilege to make the statements in question. Florida law recognizes a privilege for "statements of a citizen to a political authority regarding matters of public concern." Nodar v. Galbreath, 462 So.2d 803, 810 (Fla. 1984) Contrary to Weiss' assertions, the record will reflect that the Court never determined that Weiss possessed such a qualified privilege. Rather, it decided to permit the jury to make this determination, as provided for in Nodar. 462 So.2d at 810 ("Where the

circumstances surrounding a defamatory communication are undisputed, or are so clear under the evidence as to be unquestionable, then the question of whether the occasion upon which they were spoken was privileged is a question of law to be decided by the court.") In the present case, although the Court had little doubt that the letters did not implicate issues of public concern, it nonetheless submitted, in the interests of caution, the question of qualified privilege to the jury. The latter determined that Weiss did not possess a qualified privilege, and that if Weiss did possess such a privilege, she had abused it.[2]

With respect to Count XII (Intentional Infliction of Emotional Distress), Defendants maintain that there was insufficient evidence to support the jury's verdict because Plaintiffs did not submit any medical evidence. Plaintiff's, however, were not required to submit medical evidence in order to prevail on a claim of intentional infliction of emotional distress. Their testimonial evidence of emotional anguish was sufficient to go to the jury on this Count. Apparently, the jury took into consideration the quality of Plaintiff's proof -- they awarded one dollar in compensatory and punitive damages for each plaintiff against each defendant.

Defendant's request for Rule 11 sanctions as to Count XII is strange at this juncture of the proceedings, given that a jury has already determined that Plaintiffs' claim has merit.

In their reply memorandum, Defendants argue that this Court does not possess jurisdiction to entertain this action because Coconut Grove Bank is a necessary party under Federal Rule of Civil Procedure 19, and joinder of the Bank would defeat diversity

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[2] The latter finding was unnecessary, given the jury's prior finding that she did not possess a qualified privilege. However, it does illustrate the jury's reluctance to accept Weiss' argument that she was privileged to speak.

jurisdiction. This claim lacks merit because it is too late, after a trial on the merits, to raise the question of joinder of additional parties. Moreover, the Court does not believe that Coconut Grove Bank is a necessary or an indispensable party to this action. The Court, thus, rejects Defendants' belated efforts to divest it of jurisdiction.

Defendant's Motion for a Judgment as a Matter of Law and Renewed Motion for a Directed Verdict is hereby DENIED.

Motion for a Mistrial and New Trial

At the hearing on post-trial motions, Pollak raised for the first time the admission of a double hearsay statement during the trial, and argued that this error was of such a fundamental nature as to require a new trial. Phyllis Berkett, the mother of both Defendants, testified on behalf of Plaintiffs, and stated that Jeff Cohen, her step-son, told her that Pollak had stated to Cohen that he was learning a great deal from the litigation against the Courshons and that he did not care how long it lasted. At trial, Pollak did not object to Berkett's statement. Admittedly, Berkett's testimony was double hearsay and harmful to Defendant's interests. Nonetheless, its admission does not necessitate any remedial action by this Court. During a trial, litigants bear the burden of objecting to the admission of evidence and prompting the trial judge to make evidentiary rulings. This requirement is not relaxed when a party, such as Pollak, elects to proceed unrepresented.[3] Pollak's failure to object to Berkett's statement is

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[3] Both Pollak and Weiss proceeded to trial pro se, although they had been represented by several law firms during the course of this litigation. Weiss is an attorney who practices in the state of New York. During the trial, she made the majority of legal arguments on behalf of her brother and herself. Pollak subsequently retained counsel for post-trial proceedings.

properly construed as a waiver. Morris v. U.S. Dep't of Treasury, Internal Revenue Service, 813 F.2d 343, 347 (11th Cir. 1987) (A party "is bound by answers that are hearsay, if not objected to."). Moreover, at trial, Pollak had an opportunity to take the stand and deny making the statement to Cohen. He elected not to testify on his own behalf.

Similarly, Pollak objects to the admission of a judicial opinion rendered by the Third District Court of Appeal of Florida, in which that court characterized one of Defendant's pleadings as a scurrilous attack on Commissioner Herbert Shapiro and affirmed the imposition of sanctions against Defendants. See Weiss v. Trust under the Will of Albert Pollak et al., 595 So.2d 1035, 1036 (Fla. App. 3 Dist. 1992). The Court agrees with Plaintiffs that this evidence was relevant to the question of conspiracy and demonstrated that Pollak had participated in the preparation of documents during the course of this litigation. While the opinion was certainly prejudicial to Defendants, its relevance nonetheless outweighed its prejudice.

In his reply memorandum, Pollak argues that jury instruction 39 was incorrect because it gave a criminal, rather than civil, standard for conspiracy. Specifically, he objects to the wordings "to do an unlawful act or to do a lawful act by unlawful means." However, the Court's instruction essentially tracks Defendants' proposed jury instruction 21 which defines conspiracy as "a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purposes by unlawful means." Moreover, the Court's instruction 39 correctly states the provision of Florida law which requires that there be an independent tort in order for a civil conspiracy to exist. Williams Electric Comp. Inc., v. Honeywell, Inc., 772 F. Supp. 1225, 1239 (N.D. Fla. 1991).

Defendants lament, once again, that they were not permitted to proceed on their counterclaims against Plaintiffs. As Plaintiffs correctly point out, this issue was resolved against

Defendants before trial.

Defendant's Motion for a Mistrial and New Trial is hereby DENIED.

Defendants' Motion for an Order for Findings of Fact and Conclusions of Law for Remittitur, Set-offs, offsets and Mitigation of Damages

As an initial matter, Defendants request that this Court issue findings of fact and conclusions of law, pursuant to Federal Rule of Civil Procedure 52. They maintain that "numerous points of law were left unresolved and were not even sent to the jury." Under Rule 52, a court is required to make findings of fact and to state its conclusions of law when an action is tried without a jury or with an advisory jury. Neither of these two conditions are present here. The jury rendered binding verdicts and resolved the factual disputes in favor of Plaintiffs. It is, therefore, unnecessary for this Court to issue its own findings of fact and conclusions of law.

Defendants argue that they are entitled to remittitur because the punitive damages awarded by the jury would cause them undue hardship and bankruptcy. Florida law does provide that "punitive damages may not be assessed in an amount which will clearly bankrupt or destroy a defendant." Hockensmith v. Waxler, 524 So.2d 714, 715 (Fla.App. 1 Dist. 1988). However, it is necessary for the defendants to present evidence as to net worth during the trial. "To preserve his right to contend on appeal that an award of punitive damages is excessive, it is incumbent on the defendant to introduce evidence of his net worth, if evidence has not been introduced by Plaintiff, and in the absence of such evidence an appellate court cannot say that an award of punitive damages is excessive in that it would bankrupt the defendant." Papcun v. Piggy Bag Discount Souvenirs, 472 So.2d 880, 882 (Fla. App. 5 Dist. 1985). In the instant case, Defendants chose not to present

any evidence as to net worth (or for that matter, any other issue). At this stage of the proceedings, a court reviewing post-trial motions sits in essentially the same position as an appellate court reviewing a trial record. Defendants' failure to present evidence relative to net worth precludes this Court from considering whether the punitive damages award will bankrupt defendant. There is simply no record upon which this court could order remittitur.

Defendants argue that under Hockensmith v. Waxler, this court must hold an evidentiary hearing so that Defendants may explain their financial status. 524 So.2d 715 (Fla.App. 1 Dist. 1988). Hockensmith, however, does not compel such action by this Court. First, in contrast to the present case, the defendant in Hockensmith presented evidence at trial concerning its net worth. Second, the Second District Court of Appeal did not order the Circuit Court to hold a hearing for the purpose of considering defendant's net worth. Rather, it found that the lower court's denial of a motion for remittitur was erroneous because the award of punitive damages exceeded the defendant's net worth. The Court stated, "Accordingly, we remand for remittitur of punitive damages. In the event remittitur of punitive damages is rejected, we reverse and remand for new trial on the issue of the amount of punitive damages." Hockensmith, 524 So.2d at 715.

With respect to Count XIII, Defendants maintain that the punitive damages awarded against them should be reduced on the basis of Florida Statute § 768.73. The jury awarded each Plaintiff $1.00 in compensatory damages and $1,015,000 in punitive damages. Defendants argue that the imbalance between punitive and compensatory damages violates the three-to-one ratio embodied in the statute. § 768.73 provides:

> (1)(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty, and involving wilful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded

> to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b).
>
> (b) If any award for punitive damages exceed the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the Court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances presented to the trier of fact.

The effective date of the act is July 1, 1986.

As an initial matter, the Court finds that the statute applies to Count XIII because civil conspiracy falls into the category of "misconduct in commercial cases" or "wilful, gross misconduct". Plaintiffs, however, argue that the statute is not applicable because it went into effect in July 1, 1986 and the tortious acts complained of occurred prior to this date. The Court cannot agree with this line of reasoning. In proving civil conspiracy as well as other counts in the complaint, Plaintiffs relied upon a substantial number of acts which defendants committed after July 1, 1986. For example, they introduced evidence that Defendants filed a counterclaim in this lawsuit in 1991, that they filed a motion to recuse Commissioner Shapiro in 1990, and that they continued other litigation against Plaintiffs until the early 1990's. This evidence was instrumental to Plaintiffs' proving and prevailing upon the causes of action in the complaint. At the same time, though, it triggers the limitation on punitive damages contained in § 768.73.

Although § 768.73 is applicable to the case at hand, the Court may still permit the award of punitive damages in excess of the 3-to-1 ratio if Plaintiffs have presented clear and convincing evidence that the award is not excessive. Based upon the

Defendant's tortious conduct proven at trial, the Court finds that there is clear and convincing evidence that a punitive damage award in excess of the statutory limit is justified. However, the jury's award of $1,015,000 against each Defendant is excessive, and the Court hereby orders a remittitur of $500,000 as to each Defendant.

Under the title "Mitigation," Defendants argue that they are entitled to a "post-trial" adjustment because the Court failed to give a jury instruction on the mitigation of damages. Defendants however, have not explained what steps Plaintiffs failed to take to mitigate their damages. At trial, they offered no evidence bearing on Plaintiff's failure to take steps to prevent further harm to themselves. In their post-trial motion, they assert, without substantiation, that the legal fees paid to Steel, Hector & Davis, counsel for Plaintiffs, were "neither fair, appropriate or reasonable, thus patently indicating that Plaintiffs have failed to mitigate their purported damages in any way." The Court finds this claim to be curious, especially considering that in other parts of their post-trial motions, Defendants assert that they were never given an opportunity to review Plaintiffs' legal invoices.

It also appears that Defendants have confused the concept of mitigation of damages with that of reduction of damages. Defendants somehow believe that the numerous errors, which they allege were committed by this Court and Plaintiff's counsel during the course of this litigation, necessitate a mitigation of damages. Mitigation of damages, however, is not intended to redress the types of errors which Defendants cite at length. For all of these reasons, the Court declines Defendants' invitation to review each count to determine whether mitigation is appropriate.

Next, Defendants argue that the jury awarded punitive damages against Defendants in Count XIII on the basis of Defendants' breach of the agreement to continue the partnership (Count VII) and their breach of the general releases (Count VIII). They assert that under Florida's Economic loss rule, a party may

not recover tort damages from an action arising out of a breach of contract. Jones v. Childers, 18 F.3d 899, 904 (11th Cir. 1994) (Hoeveler, J.). Although the conspiracy was necessarily an amalgamation of other counts in the complaint,[4] there is little risk that the punitive damages awarded in Count XIII stemmed from Defendants' actions in Count VII and VIII. As Plaintiffs correctly point out, the jury was instructed not to award punitive damages for the two contract counts, and was also told not to award duplicative punitive damages. The Court must assume that the jury followed its instructions.

Defendants assert that the Court committed error by not providing Defendants with the special verdict form prior to their closing arguments and the submission of the form to the jury. Although it is true that Defendants did not see the final special verdict form prior to closing arguments, they suffered no prejudice. Towards the end of the trial, the Court indicated that it would be appropriate to use a special verdict form. Plaintiffs prepared a special verdict form, while Defendants did not. Defendants had an opportunity to comment on Plaintiffs' special verdict form, and they, in fact, provided the Court with a copy of the form upon which they made written comments. After hearing argument from both sides on the special verdict form, the Court modified and revised the form in the interest of fairness, and then submitted the form to the jury at the conclusion of jury instructions. Thus, at the time of closing arguments, Defendants were fully aware of the contents of the special verdict form, and consequently suffered no harm.

Defendants next argue that they are entitled to a set-off because any funds which were transferred to Arthur Courshon, as

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[4] See Williams Electric Comp. Inc., v. Honeywell, Inc., 772 F. Supp. 1225, 1239 (N.D. Fla. 1991) (holding that for civil conspiracy to exist, there must be an independent tort).

trustee, at the conclusion of the state-court interpleader action should be credited against the amount which Defendants owe Arthur. Set-off is an affirmative defense, and as such, must be plead in the answer. See Davis v. Odeco, 18 F.3d. 1237, 1245 (5th Cir. 1994); Joseph V. Edeskuty v. Jacksonville Kraft Paper, 702 F. Supp. 741 (D.Minn. 1989). Defendants failed to raise set-off as a defense in their answer, and consequently are precluded from doing so post-trial.

Defendants also assert that they are entitled to an off-set as a result of the settlement agreement entered into between Phyllis Berkett (Defendants' mother) and Plaintiffs. In Plaintiffs' Complaint, Berkett was named as a defendant, individually, as a co-conspirator and as a beneficiary. On November 20th, 1990, Berkett agreed to pay Plaintiffs $249,900 and to execute a promissory note in the amount of $345,100. In return, Plaintiffs agreed to dismiss their claims in this lawsuit against Berkett. Paragraph 12 of the agreement provided in part, "To the extent that ... Plaintiffs in Courshon, et al. v. Patricia Pollak Weiss, et al., Case NO. 86-0394-CIV-HOEVELER, recover any monies from Patricia Weiss or Thomas Pollak in that action, by settlement, judgment or otherwise, those monies will be applied immediately to the payment of the Note described in Paragraph 1, until that Note has been paid in full, including interest." Berkett also agreed to cooperate with Plaintiffs by making herself available for depositions and trial testimony. It is on the basis of this payment from Berkett to Plaintiffs that Defendants maintain that they are entitled to an offset.

Plaintiffs correctly assert, however, that off-set is an affirmative defense which Defendants failed to raise in their answer. Berkett settled with Plaintiffs in 1990, some five years before the trial of this matter. If Defendants wished to raise offset as a defense, they should have amended their answer prior to trial. Moreover, during the course of the trial, Defendants failed to introduce the settlement agreement as evidence. As a result, important questions regarding the settlement agreement were never

explored through examination and cross-examination. For example, it is unclear what claims Berkett actually settled with Plaintiffs. Because of the complexity of the claims, it is simply too difficult, based on the pleadings alone, to determine the relationship between the damages awarded by the jury and the settlement payments made by Berkett. Having failed to develop an adequate factual record, it is too late for Defendants to complain.

Next, Defendants claim that they were prejudiced by a clerical error in Count VIII of the special verdict form. Count VIII addresses Defendants' breach of the general releases which they granted to Plaintiffs. Count VIII of the form states that the jury may award compensatory damages to Plaintiffs "if you find that Arthur and/or Jack Courshon sustained damages as a result of the Patricia Weiss's activities in Count VII" and "if you find that Arthur and/or Jack Courshon sustained damages as a result of the Thomas Pollak's activities in Count VII." (emphasis added). The jury awarded Plaintiffs $200,000 against each Defendant. Defendants argue that it was improper for the jury to consider Weiss and Pollak's conduct in Count VII when determining damages for Count VIII. Although Count VIII of the special verdict form contains an inadvertent error, the Court does not believe that this error prejudiced Defendants. The mistake occurred in the Special verdict form rather than the jury instructions, which are a far more important source of guidance for the jury. Moreover, jury instruction number 25 specified the activities of the Defendants which could give rise to damages. Specifically, it referred to "the loss of income as a result of the lawsuits filed by [Weiss and Pollak] for actions specifically governed by the "General Releases" and "Fees and costs incurred in defending claims barred by the General Releases." (emphasis added). Given the explicitness of the jury instructions, there is little possibility that the special verdict form misled or confused the jury. The Court is confident that the jury's award of compensatory damages related only to the breach of general releases alleged in Count VIII. See Clarksville-Montgomery County School System v. United States Gypsum Company, 925

F.2d 993, 1003 (6th Cir. 1991) ("Even where a portion of a jury instruction is erroneous, if the point is explained and corrected in other parts of the charge so that the jury will not be misled, the jury's verdict must be affirmed.").

Along the same vein, Defendants point to an error in jury instruction number 25, which they assert prejudiced them. In its original form, the instruction stated, "It is further alleged by the plaintiffs that the defendants breached the general releases by writing and publishing a letter to the Office of the Comptroller of the Currency accusing Plaintiffs of wrongdoing." (emphasis added). During jury deliberations, Defendants brought the error to the attention of the Court -- Weiss is the only defendant who is alleged to have written a letter to the Comptroller of the Currency. The Court subsequently delivered a note to the jury, instructing them to substitute the words "Defendant Weiss" for "the defendants." This curative instruction was more than adequate to correct what amounted to a minor error in the jury instructions.

Defendants again take exception to jury instruction number 25 on the grounds that it instructed the jury that the Court had concluded as a matter of law that Plaintiffs suffered damages from the breach of the general releases. The instruction states, "Plaintiffs have suffered damages in one or more of the following respects:" It then lists three potential grounds for damages. As with Defendants' other objections to jury instruction 25, this one is without merit. Read in the context of the entire instruction, this portion of number 25 does not support Defendants' contention. Rather, it is part of the court's broader explanation of the allegations which Plaintiffs assert in Count VIII. The Court was instructing the jury that it could consider these factors should they decide to award damages in Count VIII. The last sentence of the instruction -- "Plaintiffs claim that one or more of the foregoing was the legal cause of their damages" (emphasis added) -- makes clear that the issue remained open for resolution by the jury.

Defendants object to the introduction of Plaintiff's

composite exhibits 187 and 188, which compile the legal expenses incurred by Plaintiffs as a result of litigation with Defendants. Defendants argue that Plaintiffs did not comply with the requirements of Federal Rule of Evidence 1006, which governs the summary of voluminous documents. Among their objections to these exhibits, they assert that Plaintiffs did not submit the underlying legal invoices for inspection before trial.

Defendant's objections on the grounds of Rule 1006 are without merit. It was unnecessary for Plaintiffs to rely upon Rule 1006 in order to introduce evidence of the damages sustained from Defendants' litigious conduct. As witnesses, Plaintiffs were competent to testify as to the subject matter because they had personal knowledge of the legal expenses which they incurred over many years of litigation with Defendants. The source material upon which they relied was not so voluminous as to require a summary under Rule 1006. If Defendants had questions about the legal invoices which formed the basis for damages, they could have cross-examined Plaintiffs and required them to produce the documents in court. Defendants chose not to do so.

Finally, the Court declines Defendants' invitation to examine Plaintiffs' legal invoices in order to determine whether they are accurate. The obligation of scrutinizing Plaintiffs' proof lay with Defendants either before or during trial, not with the Court post-trial.

Defendants' Motion for an Order for Findings of Fact and Conclusions of Law for Remittitur, Set-offs, offsets and Mitigation of Damages is hereby DENIED, except for the remittitur of $500,000 to each Defendant in Count XIII.

Defendants' Motion for Rule 11 Sanctions against All Plaintiffs and Steel, Hector & Davis

Defendants' Motion for Rule 11 Sanctions against the

Plaintiffs and Steel, Hector & Davis is hereby DENIED. The Court finds that Plaintiffs and their counsel have not filed frivolous pleadings during the course of this litigation.

Defendants' Motion for an Order Staying Execution of or any Proceeding to Enforce the Judgment.

Defendants seek to stay the execution of or any proceedings to execute the final judgment. They argue that Plaintiffs should not be able to execute while the present post-trial motions are pending. With this Order, the Court disposes of these motions. Defendants are, to avoid efforts at execution, required to post supersedeas bonds, pursuant to Federal Rule of Civil Procedure 62.

Thomas Pollak's Emergency Motion for Immediate Mediation

Pollak urges this Court to delay ruling on these post-trials motions and to direct the parties to conduct mediation. The Court sees no value to mediation at this late stage of the proceedings, especially since Plaintiffs have indicated that they are inalterably opposed to mediation. Thomas Pollak's Emergency Motion for Immediate Mediation is hereby DENIED.

DONE AND ORDERED in chambers at Miami, Florida this 6th day of October, 1995.

"s/_____".
WILLIAM M. HOEVELER
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
Alvin Davis
Bill Ullman
Patricia Pollak Weiss

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5414

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 15 1997
MIGUEL J. CORTEZ
CLERK

ARTHUR H. COURSHON and JACK R. COURSHON, each Individually, as Trustees of the Aaron Courshon and Paul Pollak Trusts, as Former Managing Partners of the Thunderbird Partnership, and as Beneficiaries of the Aaron Courshon Trust,

Plaintiffs-Appellees,

versus

PATRICIA POLLAK WEISS, Individually, and as Co-Conspirator, and as the Purported Successor Trustee and Beneficiary of the Albert Pollak Trusts,

Defendant-Appellant,

PHYLLIS POLLAK BERKETT, JAMES POLLAK, GAIL POLLAK BARIL,

Defendants,

THOMAS POLLAK, each Individually, as Co-Conspirators, and as Beneficiaries of the Albert Pollak Trusts,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, _____F.2d____).

Before: ANDERSON and BIRCH, Circuit Judges, and WOODS*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

"s/_____"
UNITED STATES CIRCUIT JUDGE

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*Honorable Henry Woods, Senior U.S. District Judge for the Eastern District of Arkansas, sitting by designation.

ORD-42
(6/95)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 86-394-CIV-HOEVELER

FINAL JUDGMENT

FILED BY "s/_____ D.C."
MAR 16 1995
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

ARTHUR H. COURSHON, et al.,

Plaintiff,

vs.

PATRICIA POLLAK WEISS, et. al., #581

Defendant. 3/16/95

THIS CAUSE came before the Court and a jury for trial on February 13, 1995. The parties presented evidence and argument to the jury and the case was concluded on March 7, 1995, when the jury returned its verdict, a copy of which is attached hereto and incorporated as part of this final judgment. It is therefore,

ORDERED AND ADJUDGED that judgment be and it is hereby entered, as to Count (III) in favor of plaintiff, ARTHUR COURSHON, as Trustee, and against defendant, PATRICIA WEISS in the amounts of ONE HUNDRED THIRTY EIGHT THOUSAND AND 00/100 DOLLARS ($138,000) for

compensatory damages and FIVE HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS ($550,000.00) for punitive damages. It is further

ORDERED AND ADJUDGED that judgment be and it is hereby entered, as to Count IV in favor of plaintiff, ARTHUR COURSHON, as Trustee, and against the defendant, PATRICIA WEISS in the amounts of ONE AND 00/100 DOLLAR ($1.00) for compensatory damages and ONE AND 00/100 DOLLAR ($1.00) for punitive damages. It is further

ORDERED AND ADJUDGED that judgment be and it is hereby entered, as to Count VII in favor of plaintiffs, ARTHUR COURSHON AND JACK COURSHON, as Trustees, and against the defendant, PATRICIA WEISS in the amount of TEN THOUSAND AND 00/100 DOLLARS ($10,000.00). It is further

ORDERED AND ADJUDGED that judgment be and it is hereby entered as to Count VII in favor of plaintiffs, ARTHUR COURSHON AND JACK COURSHON, as Trustees, and against the defendant, THOMAS POLLAK in the amount of TEN THOUSAND AND 00/100 DOLLARS ($10,000.00). It is further

ORDERED AND ADJUDGED that judgment be and it is hereby entered, as to Count VIII in favor of plaintiffs, ARTHUR COURSHON and JACK COURSHON and against the defendant, PATRICIA WEISS in the amounts of ONE HUNDRED THOUSAND AND 00/100 DOLLARS ($100,000.00), each, for compensatory damages. It is further

ORDERED AND ADJUDGED that judgment be and it is hereby entered, as to Count VIII, in favor of plaintiffs, ARTHUR COURSHON and JACK COURSHON and against the defendant, THOMAS POLLAK in the amounts of ONE HUNDRED THOUSAND AND 00/100 DOLLARS

($100,000.00), each, for compensatory damages. It is further

ORDERED AND ADJUDGED that judgment be and it is hereby entered, as to Count (IX) in favor of plaintiffs, ARTHUR COURSHON and JACK COURSHON and against the defendant PATRICIA WEISS in the amounts of ONE HUNDRED TWENTY FIVE THOUSAND AND 00/100 DOLLARS ($125,000.00), each, for compensatory damages and ONE AND 00/100 DOLLAR ($1.00), each, for punitive damages. It is further

ORDERED AND ADJUDGED that judgment be and it is hereby entered as to Count (X) in favor of plaintiffs, ARTHUR COURSHON and JACK COURSHON and against the defendant, PATRICIA WEISS in the amounts of ONE AND 00/100 DOLLAR ($1.00); each, for compensatory damages and ONE AND 00/100 DOLLAR ($1.00), each, for punitive damages. It is further

ORDERED AND ADJUDGED that judgment be and it is hereby entered as to Count (XII) in favor of plaintiffs, ARTHUR COURSHON and JACK COURSHON and against the defendant, PATRICIA WEISS in the amounts of ONE AND 00/100 DOLLAR ($1.00), each, for compensatory damages and ONE AND 00/100 DOLLAR ($1.00), each, for punitive damages. It is further,

ORDERED AND ADJUDGED that judgment be and it is hereby entered as to Count XII in favor of plaintiffs, ARTHUR COURSHON and JACK COURSHON and against the defendant, THOMAS POLLAK in the amounts of ONE AND 00/100 DOLLAR ($1.00), each, for compensatory damages and ONE AND 00/100 DOLLAR ($1.00), each, for punitive damages. It is further,

ORDERED AND ADJUDGED that judgment be and it is hereby entered as to Count (XIII) in favor of plaintiffs,

ARTHUR COURSHON AND JACK COURSHON, jointly and severally, and against defendants, PATRICIA WEISS and THOMAS POLLAK in the amounts of ONE AND 00/100 DOLLAR ($1.00), each for compensatory damages and ONE MILLION FIFTEEN THOUSAND AND 00/100 DOLLARS ($1,015,000.00), each, for punitive damages.

Execution shall issue for the foregoing judgments after twenty (20) days from the date of this judgment unless appropriate post-trial motions are filed. In the event those motions are filed within the twenty (20) day period, the Court will entertain plaintiffs' motion for the posting of a supersedeas bond. Costs which are properly taxable shall be assessed upon the filing of an appropriate motion.

DONE AND ORDERED in Chambers at Miami, Florida this 16th day of March, 1995.

"s/_____"
SR. UNITED STATES DISTRICT JUDGE

cc: Alvin Davis, Esq.
Patricia Weiss, Esq.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5414

D. C. Docket No. 86-394-CIV

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL - 1 1997
MIGUEL J. CORTEZ
CLERK

ARTHUR H. COURSHON and JACK R. COURSHON,
each Individually, as Trustees of the
Aaron Courshon and Paul Pollak Trusts,
as Former Managing Partners of the
Thunderbird Partnership, and as
Beneficiaries of the Aaron Courshon
Trust,

Plaintiffs-Appellees,

versus

PATRICIA POLLAK WEISS, Individually,
and as Co-Conspirator, and as the
Purported Successor Trustee and
Beneficiary of the Albert Pollak Trusts,

Defendant-Appellant,

PHYLLIS POLLAK BERKETT,
JAMES POLLAK, GAIL POLLAK BARIL,

Defendants,

THOMAS POLLAK, each Individually, as
Co-Conspirators, and as Beneficiaries
of the Albert Pollak Trusts,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

Before ANDERSON and BIRCH, Circuit Judges, and WOODS*, Senior District Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby AFFIRMED in part and VACATED in part; and that these causes be and the same are hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendant-appellant pay plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Henry Woods, Senior U.S. District Judge for the Eastern District of Arkansas, sitting by designation.

Entered: July 1, 1997
For the Court: Miguel J. Cortez, Clerk

By: "s/_____"
Deputy Clerk

ISSUED AS MANDATE: 9/30/97